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CASE NO. 93-1366

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1993

ALLEN LANDSDOWN, INDIVIDUALLY AND
AS DEPUTY SHERIFF, DALE PENNY,
INDIVIDUALLY AND AS DEPUTY SHERIFF,

CROSS-PETITIONERS,

vs.

ANNABELLE WINTERS,

PETITIONER.

BRIEF IN OPPOSITION BY CROSS-RESPONDENT

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CASE NO. 93-1366

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1993

ANNABELLE WINTERS,
D/B/A SHARP'S PAWN SHOP,
PETITIONER

V

BOARD OF COUNTY COMMISSIONERS,
OF OSAGE COUNTY, OKLAHOMA, ET AL.
RESPONDENTS

BRIEF IN OPPOSITION BY CROSS-RESPONDENT TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION BY CROSS-RESPONDENT

Petitioner, Annabelle Winters, is the proprietor of Sharp's Pawnshop, located in Osage County, Oklahoma. The action below was commenced following the unconstitutional seizure and subsequent disposition of property confiscated from the pawnshop by the Cross-Petitioners,

Allen Landsdown and Dale Penny, employees of the Osage County Sheriff's Department. Petitioner filed her action in the District Court for the Western District of Oklahoma. Following the Trial Court's granting of summary judgment in favor of all Defendants, Petitioner appealed to the Tenth Circuit Court of Appeals alleging three (3) grounds for relief; (i) that the provisions of Okla. Stat. Ann. tit. 59 §§ 1508 & 1515 (West. Supp. 1993) and Okla. Stat. Ann. tit. 12 § 1092 (West 1989) are unconstitutional; (ii) that the warrantless seizure of the property in question was in violation of Petitioner's Fourth Amendment rights; and, (iii) that disposition of the property was made in violation of Petitioner's right to Due Process of law. The appeal was taken

pursuant to Rule Four of the Federal Rules of Appellate Procedure.

The Tenth Circuit found in favor of Petitioner with respect to the second and third allegations and remanded the case for further proceedings as to the Cross-Petitioners. Petitioner has petitioned this Court to review the Tenth Circuit Court's failure to address the ramifications of Oklahoma Pawnshop regulations on the constitutional right of privacy of pawn customers, but only finding that federal banking regulations did not apply in the case of pawn transactions. This action is filed as Case Number 13-1248.

Cross-Petitioners are seeking review of the balance of the Tenth Circuit decision. Specifically, the Cross-Petitioners request this Court to decide the necessary role of exigent circum-

stances in the warrantless search of a pawnshop and subsequent seizure of property from the store and whether the Cross-Petitioners should have been entitled to qualified immunity. These are not issues which require the attention of this Court.

PROPOSITION I

PETITIONER'S FAILURE TO RAISE ANY SPECIAL OR IMPORTANT REASON COMPELLING THE EXERCISE OF THIS COURT'S DISCRETION SHOULD RESULT IN THE DENIAL OF THEIR PETITION FOR CERTIORARI.

The purpose of the extraordinary remedy of certiorari is to offer a limited review of a cause of proceeding below. It should only be granted when the case under review clearly presents a case of unfair justice entitled to redress, but the ordinary forms of proceedings are not capable of providing relief.

This Court has limited access by way of certiorari recognizing that only fundamental questions of widespread importance should be considered:

> [I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 42 S.Ct. 315, 66 L.Ed.2d 792, 393 (1923).

The Supreme Court rules further delineate the narrow limits of this seldom granted request:

> [Certiorari is] not a matter of right, but of sound judicial discretion and will be granted only where there are special and important reasons therefore.

Supreme Court Rule 19(1).

Analysis of Cross-Petitioner's claims indicates that most of the claims rest on the validity of factual findings by the courts below. In such a case, this Court should deny certiorari in that no claim other than the sufficiency of the evidence is presented by Petitioner. In the words of Justice Frankfurter:

> Appeals challenging the sufficiency of the evidence are an unwarranted waste of time.

Ferguson v. Moore-McCormack Lines, 352 U.S. 521, 77 S.Ct. 457, 1 L.Ed.2d 511 (1957) (Frankfurter, J. dissenting).

Among all the appellate courts, the Tenth Circuit is prominently at the forefront of litigation involving pawnshops. In Wolfenbarger v. Williams, 826 F.2d 931 (10th Cir. 1987), the Tenth Circuit first recognized that a pawnshop owner had a valuable property interest in

pawned property which subsequently was alleged or proven to be stolen. This interest in property, according to the Court, carried with it all the constitutional rights generally associated with property ownership, including that of due process when the store owner is deprived of the property.

These same principals were built upon and continued by the Tenth Circuit in S & S Pawnshop v. City of Del City, 847 F.2d 432 (10th Cir. 1991). The Court continued its acknowledgement of the protection of the valuable rights held by the pawnshop owner as it examined the Oklahoma legislative scheme of pawnshop regulation.

Finally, with the decision in this case, Winters v. Board of County Commissioners, 4 F.3d 931 (10th Cir. 1993), the

Tenth Circuit explicitly defined the fine line between the right of the State to engage in random, warrantless searches in the interest of preventing the disposal of stolen property and the pawnshop owners' constitutional rights to be free from unreasonable, warrantless searches and seizures. The Court reached the well justified conclusion that once an officer formed a suspicion that particular property might have been stolen, in the absence of any exigent circumstances, fundamental principals of constitutional rights demand that a search warrant be obtained before a search and/or seizure could be made in the pawnshop.

This holding is in clear conformity with the spirit of Oklahoma law. Procedures have been specifically established by the Oklahoma legislature in the

Oklahoma Pawnshop Act, Okla. Stat. tit. 59 §§ 1501 (1991) et seq., which provide a means for law enforcement officers to temporarily protect particular property from disposition while a warrant is obtained. Specifically, in Okla. Stat. tit. 59 § 1508 (West. Supp. 1993), the law provides that an officer may request that the pawnshop owner "hold" any object which interests the local law enforcement officer. Certainly, this process protects the property while a warrant can be obtained.

The pivotal distinction between the present case and the many cases discussed in the Cross-Petition is that when the officers went into Petitioner's place of business, it was with a distinct suspicion that what they were looking for would be found. In such a case, a warrant must be

required. Contrary to the argument of Cross-Petitioners, this result is supported by the previous decisions of this Court.

The threshold evaluation of any case involving a warrantless search must be based on the principles established by this Court in Horton v. California, 496 U.S. 128, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990). Prior to the Horton decision, a plain view search or seizure required proof of three (3) hallmark characteristics in order to justify the police action under the Fourth Amendment:

1) the evidence must be in plain view;

2) the discovery of the evidence must be inadvertent; and

3) the criminal nature of the item must be "immediately apparent".

Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). The

Court held that these three (3) restrictions served to protect important Fourth Amendment rights while allowing the warrantless seizure of property when circumstances dictate.

The elimination of inadvertency as a test by the Court in Horton was obviously based on the supposition that if a police officer expects to find particular property in a particular place, then he will properly obtain a warrant to allow the search to proceed. See 496 U.S. at 139-141. The Court reasoned, however, that an officer who obtained a warrant, but suspected other property might be found, should not be prohibited from seizing that property solely because it was not listed in the warrant if the object was in plain view and of a clearly criminal nature. It is crystal clear from

the Court's analysis that the elimination of the inadvertency requirement was never intended to allow wholesale seizures from any business just because it displays its inventory in "plain view".

The protection provided by the 'new' plain view search were summarized in the subsequent case of Soldal v. Cook County, 506 U.S. ___, 113 S.Ct. ___, 121 L.Ed.2d 450, 461 (1992). The Court refused to justify the warrantless seizure of a mobile home on plain view grounds (the mobile home was undeniably in plain view), holding:

> If the boundaries of the Fourth Amendment were defined exclusively by rights of privacy, 'plain view' seizures would not implicate that constitutional provision at all. Yet, far from being automatically upheld, 'plain view' seizures have been scrupulously subjected to Fourth Amendment inquiry. Thus, in the absence of consent or a warrant permitting the seizure of the

> items in question, such seizures can be justified only if they meet the probable cause standard.

The bottom line is clear: the Supreme Court expects reasonable behavior from police officers. "The plain view doctrine 'merely reflects an application of the Fourth Amendment's central requirement of reasonableness to the law governing seizures of property.'" Soldal, 121 L.Ed.2d at 461-62, quoting Coolidge, 403 U.S. at 468.

The Court made the point in Horton that plain view alone will never justify a seizure. This is especially true if the search leading to the seizure does not otherwise meet Fourth Amendment standards. Horton, 496 U.S. at 134. The Court, in footnote 7, quoted Taylor v. United States, 286 U.S. 1, 52 S.Ct. 466, 76 L.Ed. 951 (1932), as recognizing "no amount of

probable cause can justify a warrantless search absent 'exigent circumstances'".

In this case, police officers went into Appellant's place of business fully expecting to find items which they believed to be stolen property: items which most certainly did not have a readily apparent criminal nature. Without regard for the fact that the Petitioner was in lawful possession, they searched the premises, confiscated the merchandise, then sought to justify the seizure on "plain view" grounds. The assertion of plain view in the context of this case is unconscionable---no business would be safe. Fortunately (and understandably), Horton provides neither logical, moral, nor legal support for Appellees' groping assertions. The legitimation of this kind of search was not what the Supreme Court

had in mind when it retreated from the inadvertency requirement.

There is no new or novel issue which requires this Court to intervene in the development of the law in this area. The cases decided by the Tenth Circuit have been more than adequate to establish a well reasoned procedure to avoid the violation of established constitutional rights. There is no reason to grant review of this case on these issues.

PROPOSITION II

THE APPLICATION OF THE QUALIFIED IMMUNITY DOCTRINE IN THIS CASE INVOLVES ONLY QUESTIONS OF FACT, THUS IS NOT AN APPROPRIATE ISSUE FOR THIS COURT.

In addition to the allegations which Cross-Petitioners have raised with respect to the validity of the Tenth Circuit's decisions concerning the soundness of the search and seizures made in the instant case, they also have identified another

issue in the "Questions Presented" portion of the brief. This issue concerns the application of the doctrine of qualified immunity to the Cross-Petitioners. As noted above, the procedures involved with the warrantless search and seizure of a property from a pawnshop are well documented, both in the statutes of the State of Oklahoma and in the case law of the Tenth Circuit. It is difficult to accept Cross-Petitioners' claim here that because the law was not clearly defined, they should not be held to a standard which would have required their compliance with those dictates.

In this case, the trial court found the facts to be such that the officers involved in this case used pretextual means to undermine Petitioner's constitutional rights. By doing so, Cross-

Petitioners acted in bad faith, and were thus not entitled to invoke the doctrine of qualified immunity to protect them from the consequences of their actions. This result is consistent with the law established by this Court with respect to the defense of qualified immunity. See Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) (qualified immunity defense not applicable if right is "clearly established" at time of violation); Pierson v. Ray, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967) (application of defense requires finds of both "good faith" and "probable cause").

As discussed in the proposition above, the law was clearly defined at the time the actions were taken against Petitioner by Cross-Petitioners. Accordingly, the trial court, and subsequently the

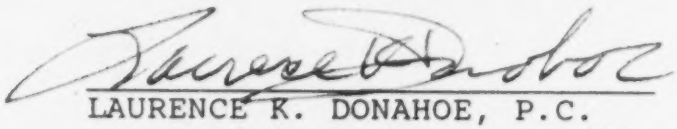
Tenth Circuit, appropriately decided that Cross-Petitioners were not entitled to rely on the defense of qualified immunity in order to excuse their flagrant disregard for these well established principles of law. The factual determinations of the lower courts and the application of these facts to well-settled law are not issues with which this Court should be concerned. As noted above, certiorari review does not contemplate review of factual disputes. This issue does not present any issue ripe for review by this Court.

CONCLUSION

For the reasons stated, it is respectfully requested that this Court refuse Cross-Petitioners' request for certiorari review. Alternatively, if the Cross-Petition is granted, Petitioner requests that the Court also grant her

request for review of additional related issues in Case Number 93-1248.

Respectfully submitted,



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